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No. 86-1877 (4)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

CHARLES F. FOGERTY, et al.,
Petitioners,

VS.

STATE OF CALIFORNIA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Court Of Appeal of the State of California for the Third Judicial District

REPLY BRIEF OF PETITIONERS

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In a not unfamiliar tactic for a respondent opposing certiorari, the State has done its best to muddy the waters, warning the Court away from the case by invoking the picture of a "swamp" (Br. in Opp. at 10)—inappropriately, one may think, when the setting is Lake Tahoe, a "unique mountain lake," "famed for its scenic beauty and pristine clarity." *Lake County Estates v. Tahoe Planning Agency,* 440 U.S. 391, 393 and n.2 (1979). The attempt ought not succeed: whatever else can be said about this controversy, the factual background is in no sense unsettled, confused, or incomplete, and the legal issues are equally uncomplicated. The burden of the present reply brief will be to seek to make clear once again what has been rendered murky. We first stress the immediate practical consequences of the decision below; then we briefly rebut the suggestion that no substantial legal issue is presented, or at least no question of federal law.

ARGUMENT

A. Valuable Property Interests are Immediately at Stake

1. Petitioners' opposition would have the Court believe that hardly anything of substance has yet been decided and that we should patiently wait and see whether the state court rulings have any bite when applied to the particular properties owned by petitioners. The State seems to be saying that the rejection of its *fee title* claim to the shorezone of navigable freshwater lakes—in favor of a mere "public trust" easement—has deflated the dispute to a level below the notice of a constitutional court. *See* Br. in Opp. at 2, 3-6, 7-9. What is more, the State's argument continues, the actual exercise of this easement is wholly conjectural, only "potential" (*id.* at 7), it being as yet undetermined "whether and how the public trust will be applied" (*id.* at 9), given that "[n]o actions for injunctive relief have been brought by the Attorney General, or anyone else" (*id.* at 6). Finally, even if implemented, it is said the public trust interest "may be curtailed or adapted to dovetail with private needs (and even wants)" (*id.* at 7), there being "many uses compatible with the trust interest" (*id.* at 5). Accordingly, the State concludes, "petitioners have not been harmed" and may never be (*id.* at 9).

To put the matter politely, this is disingenuous. It is not credible that a decade of litigation through all the California courts, with two applications to this Court, was much ado about nothing. Nor can we ignore the State's substantial incentive for invoking the public trust doctrine as applied to lands alienated long ago: to recapture private property for public use without payment of the compensation that surely would be due if the interest were straightforwardly condemned or sought to be appropriated by new regulations. *See Nollan v. California Coastal Commission,* No. 86-133, slip op. at 5-6 (June 28, 1987). As counsel of record for California more candidly wrote elsewhere, the theory of the public trust doctrine is that, when the State granted into private ownership the lands permanently or periodically covered by navigable waters, the grantees—albeit told nothing at the time—only "received bare title, with the public trust lingering over the land like the smile of a juridical Cheshire cat." J. Stevens, "The Public Trust: A Sovereign's Ancient Prerogative

Becomes the People's Environmental Right," 14 U.C.D. L. Rev. 195, 215 (1980). The truth is that the imposition of the public trust easement on the shorezone critically devalues the owner's title, reducing it to a naked fee. Indeed, this Court has expressly so held, characterizing the easement as "substantially in derogation of the fee interest," "expansive," and "of substantial magnitude," giving "the State . . . an overriding power to enter upon the property and possess it, to make physical changes in the property, and to control how the property is used," leaving to the landowner "little more than the naked fee." *Summa Corp. v. California ex rel. State Lands Commission,* 466 U.S. 198, 202 n.1, 205, 209 (1984).

2. It is beside the point that no express injunction has been issued against petitioners to restrain any specific use of their shorezone. Once recognized, the public trust servitude immediately confines the landowner's rights—and destroys the marketability of the portion of his property encumbered by the servitude. Henceforth, if he is to respect the law without waiting to be enjoined to do so, he may not develop his trust property for residential or agricultural or commercial purposes; instead, until otherwise directed, he must preserve it unimproved; and he must permit all the public to use it at will for boating, swimming, or fishing when covered with water; and for picnicking, hunting, hiking, birdwatching or nature study when dry. *See* Pet. App. at A-25 to A-26, A-58 to A-60. *See also* Pet. App. at A-8, A-66 to A-67, A-69. Unless the interest was reserved at conveyance, to impress such a servitude on private property undoubtedly amounts to a "taking" for which compensation must be paid. Indeed, the burden imposed here is greater than the relatively limited public right of navigation involved in *Kaiser-Aetna v. United States,* 444 U.S. 164 (1979), or the right of passage considered in *Nollan.*

To be sure, it is theoretically possible that neither the State nor any citizen would invoke the courts to compel petitioners to respect the public trust easement if they were to flout the law as now declared by California's highest court, or that substantial time would pass before such an action were initiated. So, also, it conceivably could happen that, although the owner scrupulously

respected the dominant servitude by eschewing all development and removing any fences, no member of the public took advantage of his rights and the State itself forsook appropriating the property to any public trust uses. There is every reason to think these are most unlikely scenarios. But, at all events, it is quite clear that we need not wait and see whether such inactivity ensues before deciding whether a "taking" has occurred.

As of now, petitioners have lost control of their properties, including the right to exclude others. No more here than in *Kaiser-Aetna* or *Nollan* is it necessary to know how many outsiders will enter, how often they will come, and how inconvenient to the owner their presence will prove. If California had prevailed in recapturing the whole fee of the shorezone, no one would have suggested that whether a "taking" occurred depended upon the future intentions of the State or the public, or the past intentions of the landowner. A different approach is not warranted because the interest appropriated is nominally an easement. Here, also, the question must be judged objectively, without regard to subjective values or damages peculiar to the proprietor, just as is the case when fixing the *amount* of compensation due. See *United States v. 50 Acres of Land,* 469 U.S. 24, 35-36 (1984); *(United States v. 565.54 Acres of Land,* 441 U.S. 506, 510-512, 514-515 (1979).

3. In sum, our Petition correctly stated that, in this case, "the physical extent and the legal intensity of the burden have been fully defined." Pet. at 16. It remains only to stress also, as we there said (*ibid.*), that "all avenues of relief (short of this Court) have been firmly shut," and that there is, accordingly, no question of lack of "finality" or "ripeness" here. We take up the matter again only because several passages of California's opposition, although slippery to the grasp, state or imply that the decision sought to be reviewed is not "final" or that, at all events, further judicial proceedings are contemplated which will more specifically define the scope of the easement impressed on petitioners' lands. *See* Br. in Opp. at 1, 5, 6, 7-9, 25-27.

It is grossly deceptive to speak of a decision by the California courts to "bifurcate the inquiry over the public trust interest in the Lake Tahoe shorezone." Br. in Opp. at 9. The fact is that, unless

this Court requires it, *no further judicial proceedings of any kind* are contemplated in these cases. It is now finally determined that petitioners' shorezone lands, with boundaries exactly defined, are impressed with a public trust easement and, as this Court itself has noted, the consequences of that ruling are not in doubt in light of prior decisions of the California Supreme Court. *See* p. 3, *supra*. If the judgment below stands, members of the public need no additional declaration to exercise their right to come onto the land of any one of the petitioners, up to the artificial high mark, for any or all of the purposes already listed (p. 3, *supra*), and none of the owners can lawfully exclude such visitors on the ground that a court has not yet issued a detailed injunction or declaration particularizing the public rights appertaining to this property.

Of course, new cases may arise if the State, the landowners, or a member of the public, wish to challenge actions or administrative decisions taken in the future. But there is no such thing as a variance or exemption from the public trust, since, by definition, the interest is inalienable and may be asserted by the public *against* State authorities inclined to waive it. *See Summa Corp.*, 466 U.S. at 205. The litigation that might eventuate in respect to these properties is akin to a landowner's suit in trespass or an action by the holder of a right of way to enjoin an obstruction to the exercise of his easement. Such proceedings may occur in connection with any land interest and the prospect that they will, or will not, happen here has no bearing on the finality of the present judgment or the ripeness of the questions now tendered.

4. It is equally clear that there is no prospect of obtaining monetary compensation through the state courts. Consistent with its holding that the public trust easement had been reserved *sub silentio* before any conveyance of the land, the California Supreme Court expressly rejected the claim that its decision works a "taking." Pet. App. at A-61 to A-63. On remand, the trial court unambiguously denied that the federal Just Compensation Clause was transgressed (Pet. App. at A-20), and, in that respect, the judgment of the superior court has been affirmed. *See* Pet. App. at A-5 to A-6 n.3, A-7 n.5, A-17, A-76. What is more, as this Court well knows, California steadfastly refuses monetary compensation for a regulatory "taking." *See MacDonald, Sommer and Frates v.*

County of Yolo, No. 84-2015, slip op. at 4-5 (June 25, 1986). While denial of payment for the *interim* period before the regulation is withdrawn has been held unconstitutional (*First Lutheran Church v. County of Los Angeles,* No. 85-1199, slip op. (June 9, 1987)), no such claim is advanced here and California remains free to prefer invalidation of a regulation that amounts to a taking. *See First Lutheran Church,* slip op. at 15; *Nollan,* slip op. at 15-16. The upshot is that the state system offers no relief and that the "taking" claim is fully ripe for consideration by this Court.

5. We have shown what is at stake for the petitioners here and now. But they do not stand alone. The California Supreme Court was at pains to stress the "vast importance" of the issues "to the general public as well as to the owners of the land bordering upon navigable lakes and streams" (Pet. App. at A-37 to A-38), noting that its decision would affect rights "in 4,000 miles of shoreline along 34 navigable lakes and 31 navigable rivers, and many thousands of acres of land between high and low water" (Pet. App. at A-24). Nor is the basic question presented confined to California. In one of the decisions below, it was asserted that a like result obtains in Minnesota and South Dakota. Pet. App. at A-57, A-63. California now claims several other States in support. Br. in Opp. at 13-14. However that may be, it *is* true that the issue potentially arises in a great many states—a substantial majority—which concede to the riparian proprietor the shorezone (and sometimes the entire bed) of at least some non-tidal navigable waterbodies. *See* No. 86-1901, Pet. App. at A-94 to A-99. Given the increasingly conflicting pressures on local governments to do more with less, it would not be surprising to see California's example widely imitated if this Court stands aside. The question urgently calls for resolution.

B. Substantial Federal Questions are Now Presented

1. Matching his declared uncertainty about the burdens resulting from attaching a public trust easement to littoral lands, California's Attorney General purports not to understand what question of *federal law* is presented. He stresses that, at statehood, the equal footing principle confirmed to California title to the beds of all navigable waters *to the high water mark* and that,

thereafter, the State was free to retain, alienate, or divide its interest in the shorezone. Br. in Opp. at 10-14. This is, of course, entirely true—as we expressly noted in our petition (at 12). But our claim is that, once a state unconditionally cedes all its title to the shorezone—as California did more than a century ago in the case of non-tidal waters—the attempt to recapture that interest, or a substantial part of it, without payment, runs up against the federal constitutional rule prohibiting governments from taking "private property . . . for public use without just compensation." That principle applies to all land now in private hands—whether title is derived from the state, from the United States, or from a prior sovereign—and the equal footing doctrine is wholly irrelevant. Nor does this Court's decision in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), remotely affect the proposition.

2. Since California does not challenge our submission that a state court may no more work a taking without payment than the legislative or executive branches (Br. in Opp. at 7), the only issue on this aspect of the case is whether the present decision of the California courts in fact establishes a new rule of property law, unknown to petitioners and their predecessors when they acquired their lake-front lands in the last century. As to that, we read the California Supreme Court as effectively conceding that no prior California judicial decision, legislative declaration, or administrative ruling had so much as whispered the idea that a public trust easement (as opposed to a simple right of navigation) *attached above the low water mark* of *non-tidal* waterbodies at any season, much less when the shorezone is uncovered. *See* Pet. App. at A-24 to A-28, A-53 to A-63. *See also* Pet. at 11 and n.7. Respondents' present suggestion to the contrary simply does not bear scrutiny. *See* Br. in Opp. at 12-13. *Compare* Pet. App. at A-64 to A-65, A-71 to A-73; Note, "Lyon and Fogerty: Unprecedented Extensions of the Public Trust," 70 U.C.D. L. Rev. 1138 (1982); Comment, "The Public Trust After Lyon and Fogerty: Private Interests and Public Expectations—A New Balance," 16 U.C.D. L. Rev. 631, 635-636, 640, 654 (1983).

3. We are far from sure how to understand the State's response to the second question presented—focusing on the

lakeshore area between the natural high water line and the higher level resulting from the operation of the outlet dam. Our point here was (and is) that an unconstitutional taking results from California's extension of its public trust easement to this zone, an area never in State ownership and previously disclaimed by the Attorney General. We are now treated to a lecture on the ambulatory character of water boundaries (Br. in Opp. at 14-16, 21-23), interrupted by a very questionable digression chiding petitioners for missing their opportunity to obtain relief under State law (*id.* at 19-20). None of this is consistent with the decision below (Pet. App. at A-9 to A-12) and probably would produce a different line. But the new arguments do not, in any event, meet our complaint. Given the California Supreme Court's concession that no California precedent exists (Pet. App. at A-29) and the Attorney General's explicit statement in prior opinions that private rights were unaffected by artificially raised lake levels, the question remains whether the Just Compensation Clause condones the present declaration of a new rule of property, depriving petitioners of substantial land interests without tender of any payment. This is an issue of federal law that cannot be avoided by reference to this State's control over its navigable waters.

CONCLUSION

For the reasons stated here and in the petition, a writ of certiorari should be granted to review the decision of the California court of appeal.

Respectfully submitted,

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